PUBLIC BANK BHD

v.

NG YOON LIN

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-11-121-1998]
1 NOVEMBER 2000

BANKING: *Banker and customer - Fraudulent withdrawal - Fixed deposit fraudulently withdrawn by third party - Onus and duties of bank to verify - Whether signatures in letter of indemnity and power of attorney authentic*

The respondent in this appeal had opened a fixed deposit account with the appellant bank and was given a receipt. By agreement between the bank and the respondent, the fixed deposit could only be withdrawn with the production of the fixed deposit receipt and the Identity Card of the respondent. However, a third party, one Mr. Toh was given a duplicate receipt in respect of the fixed deposit by the bank, after it was reported to the bank that the original receipt had been lost. The third party then withdrew the fixed deposit on the strength of a letter of indemnity and a power of attorney alleged to have been signed by the respondent. Subsequently, it was discovered that the respondent never lost the original receipt and was completely unaware that a third party had taken a duplicate receipt and that the bank was in possession of a letter of indemnity purportedly signed by her. Based on the facts the magistrate gave judgment for the respondent and the bank appealed.

Held:

[1] The magistrate who tried the case found that the signature in the power of attorney alleged to be the respondent's and the respondent's signature affixed in a police report were substantially different. This notwithstanding, the bank argued that in the letter of indemnity there was a note that the signature had been verified by the bank. However, the bank was unable to give evidence as to how the signature was verified. Furthermore, the bank failed to contact the plaintiff or call the Commisioner of Oaths or take all other reasonable steps in the ordinary course of business to verify the signatures appearing in the said documents. As there was no legislative presumption working in favour of the bank, the court agreed with the magistrate's finding that the respondent did not donate the power for the fixed deposit to be withdrawn.

[2] The power of attorney could not be accepted as properly executed and authenticated as it had not been marked as a certified copy as required by law. Even if it contained a marking that led the bank to believe that the impugned power of attorney was properly certified, it was not marked as a certified copy under s. 10 of the Powers of Attorney Act 1949 and s. 76 of the Evidence Act 1950.

[Appeal dismissed.]

Case(s) referred to:
Voo Foot Yiu v. OCBC [1936] MLJ Rep 169 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 76
Powers of Attorney Act 1949, ss. 3, 4, 10, 11

For the appellant - Jordan Sugunasingam; M/s Iza Ng Yeo & Kit
For the respondent - KS Lam; M/s KS Lam & Co

Reported by Raja Vishnu

JUDGMENT

KC Vohrah J:

The plaintiff (the respondent in this appeal) had on 8 November 1990 opened an account and deposited with the defendant bank (the appellant) a sum of RM10,000 as fixed deposit for a term of six months (ie, up to 1 May 1991) at 6.75 pa.

The plaintiff was given a fixed deposit receipt B 033767 on the same day.

There is no dispute that a fixed deposit would be released by the bank to the customer who made a deposit if the customer produces to the bank the receipt in respect of the deposit and his National Registration Identity Card for verification of his identity. By agreement between the bank and the plaintiff there was the necessity of the return of the deposit receipt before the deposit could be withdrawn (see *Voo Foot Yiu v. OCBC* [1936] MLJ Rep. 169).

It is not disputed that a Mr. Toh, a third party, on 17 January 1991, was given a duplicate receipt in respect of the fixed deposit by the bank after it was reported to the bank that the original receipt had been lost. An officer of the bank who was the sole witness for the bank was personally not aware of what had actually transpired. He produced a letter of indemnity and a Power of Attorney alleged to have been signed by the plaintiff and beyond that there was no entry in any Banker's Book (within

the meaning of the Banker's Book (Evidence Act 1949)) which was admitted within the meaning of the Act and on which the Magistrates' Court or this court could rely. The plaintiff had never lost the original receipt and she was unaware that this Mr. Toh had taken the duplicate receipt and that the bank was in possession of a letter of indemnity purportedly signed by her. She denied executing the letter of indemnity or that the signature alleged to be her signature on it was her signature and the magistrate who tried the case found as a matter of fact that the plaintiff did not execute the letter of indemnity. She found what purported to be the signature of the plaintiff in the document differed from the signature that she had affixed in her police report which she had subsequently made at the Cheras Police Station in relation to the case. I have no reason to disagree with the magistrate's finding.

It is quite clear that this Mr. Toh using the said duplicate receipt then withdrew the deposit sum of RM10,000 on 1 April 1991. He had the bank release the deposit amount to him on the strength of what purported to be a Power of Attorney. It has to be noted that on a close inspection of the said Power of Attorney (see pp. 77 to 80 of the Record of Appeal) that it is not marked as a certified copy as required under s. 10 of the Powers of Attorney Act 1949 and I will come to that later. The Power of Attorney allegedly executed by the plaintiff on the face of it showed that the plaintiff had given Mr. Toh the power to withdraw the deposit. It is, however, quite evident from the evidence of the plaintiff which, as stated earlier, the magistrate accepted, that the signature on the said Power of Attorney was not the plaintiff's and that she did not donate the power.

The magistrate gave judgment in favour of the plaintiff and she was of the view that the burden was on the defendant bank to have been careful in taking all reasonable steps in the ordinary course of business to verify that the signature appearing on the letter of indemnity was that of the plaintiff and that the bank should have taken steps to contact the plaintiff over the alleged loss of the original receipt before giving it to the third party.

The uncontradicted evidence shows that although the plaintiff had given her phone number and address to the bank she was not contacted by the bank when the duplicate receipt was released to the third party, Mr. Toh.

As noted earlier the plaintiff had denied that she had signed the letter of indemnity. There is no legislative presumption working in favour of the bank and the burden was on the bank to call the Commissioner of Oaths who purportedly witnessed the signing of the letter of indemnity by the plaintiff as witness. That was not done, and as I have observed, the

magistrate obviously found the plaintiff to have spoken the truth and she also made a finding that the plaintiff did not sign the letter of indemnity as the signature purporting to be her signature in document is different from the signature which she affixed in her police report. It is quite obvious that from a comparison done of the two signatures, the signatures are indeed different.

It was argued by the bank that in the letter of indemnity there is a note that the signature had been verified by the bank. But DW1, an officer of the bank, who produced the letter of indemnity and the Power of Attorney to the court could not tell to whom the bank's standard form for the letter of indemnity was issued nor did he know if it was the plaintiff who returned the form duly completed to the bank. It is obvious that when he said that the signature in the letter of indemnity was verified he was reading what was stamped in the document (see pp. 76 of the Appeal Record) but the officer who verified it was not called to give evidence as to how he or she verified it. It may be, bearing in mind DW1's evidence, that the person was not with the bank at the time of the trial, but there was no evidence that he or she could not be found to give evidence. It is a valid inference that the plaintiff was not the one who reported the loss of the deposit receipt and she was not the one who obtained the form from the bank for the letter of indemnity to be filled in and executed nor was she the one who completed the form and submitted it to the bank and received the duplicate the duplicate receipt. Why was not the plaintiff contacted over the phone or at her address over the loss of the original certificate as seems clear from the evidence was not done? It was not surprising that the magistrate came to the conclusion that the plaintiff did not sign the letter of indemnity and that the bank should have been more vigilant and should not have relied on the duplicate receipt without exercising due care.

It is, therefore, quite obvious that the bank had given the duplicate receipt to a third party, Mr. Toh, without the consent or approval of the plaintiff – no proof of such consent or authority was produced; and the bank had accepted the say so of the third party that the original receipt was lost without verifying from the plaintiff if she had lost it. It was with this fraud that was practiced on the bank to release the duplicate receipt which led to the second fraud being perpetrated this time by the same third party using the duplicate receipt and the Power of Attorney allegedly executed by the plaintiff to withdraw the RM10,000 of the plaintiff which was deposited with the bank. If the bank had not been negligent in the first instance the fraudulent withdrawal would not have taken place.

I now come to the use of the Power of Attorney by the third party and its acceptance by the bank.

The submissions in the court below and before me have assumed that the document used as an exhibit in the case at pp. 77 to 80 constitute a Power of Attorney properly executed and authenticated in accordance with s. 3 of the Powers of Attorney Act 1949 (Act 424) and that it had been deposited under s. 4 thereof and that it has validity to create such a power of attorney. But the document produced, I must state, cannot be accepted as such as it has not been marked as a certified copy as required by law.

Section 10 of Act 424 reads:

> 10. A copy of any such document deposited in accordance with section 4 may be presented at the office at which such document is deposited and may after verification and on payment of the prescribed fee, be marked by the Senior Assistant Registrar as a certified copy and when so marked shall become and be an office copy of such document.

The use of such office copy as evidence is spelt out in s. 11 which reads:

> 11. An office copy of any such document deposited in accordance with section 4 shall, when marked as provided in the last preceding section, be without further proof sufficient evidence of the contents of such document and of the deposit thereof in the office of the Registrar.

The document purporting to be a Power of Attorney at pp. 77 to 80 appears to have this marking:

> Registered No. 6836/91
> True Copy deposited in the High Court
> Kuala Lumpur on 22.3.91
> Compared with original
>
> Sgd (Illegible)
> Senior Assistant Registrar
> High Court, Kuala Lumpur

I think it is this marking which has led the bank to believe that the impugned Power of Attorney was properly certified.

This marking, however, appears to be the one that is required under s. 4 of the Act 424 to be made. The section reads:

> 4(1) Except as hereinafter provided no instrument purporting to create a power of attorney shall ... have any validity to create such power in West Malaysia until –

(a) a true copy of the said instrument therewith and marked by the Senior Assistant Registrar with the words "true copy;

(b) ...;

has been deposited in the office of a Senior Assistant Registrar.

So far as the document purporting to be a Power of Attorney is concerned, it is not marked as a certified copy under s. 10 of Act 424 read with s. 76 of the Evidence Act 1950, and cannot constitute sufficient evidence of its contents or that it was deposited in the office of the registrar.

Thus what was produced to the bank by Mr. Toh for the release of the deposit sum was a document not certified under s. 10 of Act 424. The bank was, without making an enquiry with the plaintiff, negligent in releasing the deposit to a third party who had no authority to receive the deposit on behalf of the plaintiff (who originally placed the deposit on fixed term) against a duplicate copy of the original receipt which had also been previously, without an enquiry having been made with the plaintiff, negligently released to the third party.

It is unfortunate that two innocent parties have to suffer the misdeeds of a third party but unfortunately the bank had failed to prevent the fraudulent withdrawal from taking place; the bank in giving the replacement receipt to a stranger breached its duty to take care and was negligent; the bank was also negligent in accepting the purported Power of Attorney without checking on its validity and releasing the money placed in the plaintiff's account without the plaintiff's authority.

Appeal dismissed with costs.